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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 72

DOROTHY NIPPERT, APPELLANT,

vs.

CITY OF RICHMOND

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED MAY 14, 1945.

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 30, 1945.

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 2901

DOROTHY NIPPERT, Plaintiff in Error,

versus

CITY OF RICHMOND, Defendant in Error

Petition for Writ of Error

To the Honorable Judges of the Supreme Court of Appeals:

Your petitioner, Dorothy Nippert, respectfully represents that she is aggrieved by a judgment in the Hustings Court of the City of Richmond, Virginia, entered against her on the 16th day of June, 1944.

A transcript of the record of the said cause is presented herewith, and as a part of this petition, from an inspection of which the following facts hereinafter assigned and complained of are made apparent:

Your petitioner was employed as a solicitor for the American Garment Company, which is owned and operated by John V. Rosser and has its office at 3617 12th Street, Northeast, Washington, D. C.

The American Garment Company employs solicitors who travel from city to city, throughout the country, obtaining orders for certain ladies' garments. A down payment is [fol. 2] required from the purchaser in an amount which is usually sufficient to pay the commission of the solicitor, and the order is then sent to Washington, D. C., and the garment is then sent by the American Garment Company to the purchaser through the United States mails, C. O. D. The solicitor at no time makes a delivery of the article, and the only compensation paid the solicitor is the amount received by way of commission.

Your petitioner, on January 20, 1944, was so soliciting orders in the City of Richmond, and on that day was arrested and charged with unlawfully engaging in Richmond in the business of a solicitor without having procured a City license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937 (R., p. 1).

On the 22nd day of January, 1944, your petitioner was tried in the Police Court of the City of Richmond and fined $25.00 and costs and ordered to purchase a city license in accordance with the above cited ordinance, and your petitioner appealed to the Hustings Court, where the case came on for hearing on an agreed statement of fact (R., pp. 7-8) and found guilty as charged, and a fine of $5.00 and costs assessed against her, and a motion to set aside the judgment as contrary to the law and the evidence was denied and an exception noted.

While the record (R., pp. 5-6) contains the ordinances referred to at the trial, the only one that is material to this appeal is the following:

"Chapter 10, Section 23.—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933.)"

Assignment of Errors

1. The Court erred in holding that the City had the authority to pass the ordinance in question.

2. The Court erred in refusing to hold that the ordinance, insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution.

3. The Court erred in holding that petitioner had violated the law in soliciting orders in interstate commerce without having procured a city license as a solicitor.

[fol. 3]

Question Presented

Whether the order, under which your petitioner was convicted, which required that she obtain a license for the privilege of soliciting orders in the City of Richmond for a foreign firm, was unconstitutional and a violation of the petitioner's rights under the Federal Constitution.

Argument

The record in this case clearly presents to this Court for its decision the question as to whether or not a person known as a solicitor or drummer, having no fixed place of

business, and soliciting orders for a foreign firm, can be required by the City of Richmond to pay $50.00 for a license for the privilege of soliciting such orders.

This particular question has been presented to this Court on numerous occasions and to the Supreme Court of the United States, and it has been held at all times that the City could not require such a license for the privilege of soliciting orders.

In the Case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, Robbins was found guilty of soliciting without having first obtained a license as required by the Statute in force in Shelby Taxing District, which contained, among other things, the following:

"All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, wares, or merchandise therein, by sample, shall be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege, and no license shall be issued for a longer period than three months."

Robbins was soliciting orders for the firm of "Rose, Robbins & Co." of Cincinnati, and Robbins contended that the law imposing the tax was repugnant to that clause of the Constitution of the United States which declares that Congress shall have power to regulate commerce among the several states.

The Court, among other things, commencing at Page 496, stated as follows:

"But it will be said that a denial of this power of taxation will interfere with the right of the state to tax business pursuits and callings carried on within its limits, and [fol. 4] its rights to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the states themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce; and it may well be asked where the state gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of

importing from foreign countries, or even on that of postmaster or United States marshal. The mere calling the business of a drummer a privilege cannot make it so. Can the state legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a state privilege to carry on interstate commerce? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

and then again, commencing on Page 497, is the following:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone."

and then again at Page 498 is the following:

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will un- [fol. 5] doubtedly make such reasonable regulations as the case may demand. And Congress alone can do it; for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the

disorder which prevailed under the Articles of Confederation.

"To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because, the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will, and is itself the author of such discrimination. As before said, the state may tax its own internal commerce; but that does not give it any right to tax interstate commerce."

This same question was again before the Supreme Court of the United States in the case of *Real Silk Hosiery Mills, Inc.*, v. *City of Portland*, 268 U. S. 325, in which case the facts disclose that the Real Silk Hosiery Mills, Inc., was an Illinois corporation engaged in manufacturing silk hosiery at Indianapolis, Indiana, and selling it throughout the United States to consumers only. It employed two thousand representatives who solicit orders in most of the important cities and towns throughout the United States. The City of Portland passed an ordinance which required that every person who goes from place to place taking orders for goods for future delivery and receives payment or any deposit of money in advance shall secure a license and file a bond.

The appellant filed a bill in the United States District Court for Oregon challenging the ordinance and asking that its enforcement be restrained upon the ground, among others, that it interfered with and burdens interstate commerce and was repugnant to Article 1, Section 8 of the Federal Constitution. The Trial Court dismissed the bill.

The Court, at Page 335, said:

"Considering former opinions of this court we cannot doubt that the ordinance materially burdens interstate commerce and conflicts with the Commerce Clause. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497. * * *

" 'The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in [fol. 6] which the negotiation is made, is interstate commerce.' Manifestly, no license fee could have been required of appellant's solicitors if they had travelled at its expense and received their compensation by direct remittances from

it. And we are unable to see that the burden on interstate commerce is different or less because they are paid through retention of advance partial payments made under definite contracts negotiated by them. Nor can we accept the theory that an expressed purpose to prevent possible frauds is enough to justify legislation which really interferes with the free flow of legitimate interstate commerce. See *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189.

"The decree of the court below must be reversed. The cause will be remanded to the District Court for further proceedings in harmony with this opinion."

The City of Richmond, in the lower Court, relied upon the case of *Dunston* v. *City of Norfolk*, 177 Va. 689, 15 S. E. (2nd) 86, but it is submitted that this case was based upon an entirely different ordinance and upon a very different statement of facts, for in that case Dunston had a fixed place of business, and the license referred to required only that a tax be paid, based upon the amount of the sales made by him or in the business during the calendar year ending with the 31st day of December next preceding. It did not require a license before orders were to be solicited. This Court in the Dunston case referred at length to the case of *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388, and cited at length from the opinion in that case, and which reiterated its stand in the case of *Robbins* v. *Shelby County Taxing District, supra,* in the following language:

" 'It is also urged that the conclusion which we reach is inconsistent with the long line of decisions of this Court following *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694 (1 Inters. Com. Rep. 45) which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. In some instances the tax appeared to be aimed at suppression or placing at a disadvantage this type of business when brought into competition with competing intrastate sales. (Cases cited) In all the statute, in its practical operation, was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the state. While a [fol. 7] state, in some circumstances may, by taxation sup-

press or curtail one type of intrastate business to the advantage of another type of competing business which is left untaxed (cases cited), it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. (Cases cited.) It is enough for present purposes that the rule of *Robbins* v. *Shelby County Taxing Dist.* (120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, 1 Inters. Com. Rep. 45), *supra*, has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. (Cases cited) • • •" (309 U. S. 33, 60 S. Ct. 391, 84 L. Ed. 565, 128 A. L. R. 876."

And the Court then went on and distinguished between the Berwind-White case and the Dunston case in the following language:

"The decision in the Berwind-White Coal Mining Company case, *supra*, was made in connection with a sales tax based on the amount of the sales made. The sale contracts were entered into in New York City, and the delivery of the merchandise was made in that city. The instant case is in connection with a privilege tax—a tax measured by the amount of sales made by the taxpayer. The sales were negotiated in Norfolk and there consummated by a transfer of title or delivery of possession. Both the Berwind-White Coal Mining Company and Dunston had a fixed place of business in their respective cities. A non-discriminatory privilege tax has no different effect upon interstate commerce than a sales tax or a use tax. Each adds to the ultimate cost to the purchaser. That the tax is paid in one instance by the purchaser, and in the other by the vendor does not affect the interstate or intrastate phase of the transaction."

The counsel for the City of Richmond also relied upon the case of *Christian Corporation* v. *The Commonwealth of Virginia and the City of Richmond*, tried in the Circuit Court of the City of Richmond, and in which case a writ of error was denied by this Court on the 8th day of October, 1941.

Thereafter a petition for a writ of *certiorari* to the Supreme Court of the United States was filed and denied by that Court but it is contended that the Christian Corporation case may be easily distinguished from the present case.

The Christian Corporation was a Virginia corporation with its principal office and place of business in the City of Rich-
[fol. 8] mond, and it was required to pay a tax on the business of the preceding year, even though its income was from business obtained though interstate commerce, and the City of Richmond and the Commonwealth of Virginia relied upon the Dunston case to support its right to assess such taxes, and no question was raised in either case covering the requirement that a person obtain a license prior to soliciting orders in interstate commerce, and the City of Richmond and the Commonwealth of Virginia in their brief, which was filed in the Christian Corporation case in opposition to the petition for a writ of *certiorari*, on Page 7 stated as follows:

"But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that 'every license granting authority to engage in * * * any business * * * shall designate the place of such business * * * at some specified house or other definite place within the county or city * * *.' There is no State license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case."

Your petitioner in this case is in a similar position with the petitioner in the case of *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 63 Sup. Ct. Rep. 870, and the Court in that case, at page 112, stated as follows:

"It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44, 45, 54 S. Ct. 599, 601, 78 L. Ed. 1109, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so

costly as to deprive it of the resources necessary for its maintenance. • • •

"It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may [fol. 9] not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56-58, 60 S. Ct. 388, 397, 398, 84 L. Ed. 565, 128 A. L. R. 876), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. Id., 309 U. S., at page 47, 60 S. Ct., at page 392, 84 L. Ed. 565, 128 A. L. R. 876 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down."

Your petitioner, under the circumstances, does not feel that she should be required to pay $50.00 for a license for the privilege of soliciting orders in the City of Richmond for a foreign firm, and it is prayed that a writ of error may be awarded her to the said judgment and that the same may be reviewed, reversed and remanded to the Hustings Court of the City of Richmond, with proper directions.

It is the desire of your petitioner to state orally the reasons for reviewing this decision, and, in the event a writ of error be awarded, to adopt this petition as her brief. A copy of this petition being forwarded by Registered Mail to Henry R. Miller, Jr., Esquire, Assistant City Attorney, 402 City Hall, Richmond, Virginia, this 17th day of July, 1944.

Respectfully submitted, Dorothy Nippert, Petitioner,
by Cornelius H. Doherty, Attorney.

Cornelius H. Doherty, 4719 North Rock Spring Road, Arlington, Virginia, Attorney for Petitioner.

[fol. 10] I, the undersigned counsel, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion there is an error apparent on the face of the record of the judgment in this case, for which the same should be reviewed and reversed.

Cornelius H. Doherty, Attorney for Petitioner.

Received July 18, 1944.

M. B. Watts, Clerk.

ORDER GRANTING WRIT OF ERROR

Writ of error granted. Bond $300.00.

8-23-44. George L. Browning.

Received August 23, 1944.

M. B. W.

In the Hustings Court of the City of Richmond

City of Richmond

v.

Dorothy Nippert

Before Hon. John L. Ingram, Judge, Richmond, Virginia, June 16, 1944

WARRANT

City of Richmond, to-wit:

To all or any of the Police Officers of the City of Richmond:

Whereas, R. L. Beasley and H. H. Meeks have this day made complaint and information on oath before me, Carleton E. Jewett, Substitute Police Justice of said city, that on the 20th day of January, 1944, at said City of Richmond Dorothy Nippert did unlawfully engage in Richmond in the business of a solicitor without having procured a City [fol. 11] license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937.

These are, therefore, in the name of the City of Richmond, to command you forthwith to apprehend and bring

before me, or some other Justice of the Peace of the said city, the body of the said Dorothy Nippert to answer said complaint, and to be further dealt with according to law.

And moreover, upon the arrest of the said Dorothy Nippert by virtue of this warrant, I command you in the name of the City of Richmond to summon R. L. Beasley, H. H. Meeks, Mr. Perriott c/o Miller & Rhoads, Inc. and C. V. Werne, clo Better Business Bureau to appear at the Police Justice's Court, as witnesses to testify in behalf of the City of Richmond against the said Dorothy Nippert on the 22nd day of January, 1944. And have then and there this warrant, with your return thereon.

Given under my hand and seal this 22nd day of January, 1944.

Carleton E. Jewett, Substitute Police Justice. (Seal.)

A copy teste:
L. A. Schumann, Deputy Clerk.

(On Back)

In the Police Court

1/22/44 Richmond, Va.

Fine $25.00 and cost and ordered to purchase City License, as provided by Section 23, Chapter 10, Richmond City Code of 1937. Appeal noted.

Carleton E. Jewett, Sub. Police Justice, Richmond, Virginia.

A copy teste:
L. A. Schumann, Deputy Clerk.

[fol. 12]

City of Richmond

v.

Dorothy Nippert

Bench Warrant

Executed by arresting the within-named

And summoning the within-named witnesses

In Police Justice's Court of City of Richmond

JUDGMENT—January 22, 1944

This is to certify that the within named Dorothy Nippert, was this day tried by me for the charge set forth within

this warrant, and that upon said trial she, the said Dorothy Nippert was duly convicted of the within charge and ordered to purchase city license to pay a fine of $25.00 dollars and costs dollars, from which sentence, she the said Dorothy Nippert appeals to the next term of Hustings Court.

Given under my hand this 22 day of Jan., 1944.

C. E. Jewett, Police Justice.

A copy teste:

L. A. Schumann, Deputy Clerk.

In the Hustings Court of the City of Richmond

City of Richmond

v.

Dorothy Nippert, Dft.

JUDGMENT ON APPEAL—June 16, 1944

[fol. 13] The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City, and being arraigned pleaded not guilty of unlawfully engaging in Richmond in the business of a solicitor without having procured a City license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937, as charged. And with the consent of the accused, given in person, and the concurrence of the Court and the Attorney for the City of Richmond, the Court proceeded to hear and determine this case without a jury. And having heard the evidence doth find the said defendant guilty as charged and assess her fine at Five Dollars.

Whereupon it is considered by the Court that the said Dorothy Nippert pay and satisfy a fine of Five Dollars and costs. And thereupon the said defendant, by counsel, moved the Court to set the said judgment aside as contrary to the law and the evidence, which motion the Court doth overrule, and the defendant excepts, and time is allowed her, not to exceed sixty days from this day, in which to file her bills of exceptions. And thereupon, on the defendant's motion, the Court doth suspend the execution of said judgment until the 6th day of November, 1944, in order that the said defendant may apply to the Supreme Court of Appeals of Virginia for a writ of error and *sup-*

ersedeas, and the said defendant is recognized to make her personal appearance in this Court on the said 6th day of November, 1944.

A copy teste:

L. A. Schumann, Deputy Clerk.

Virginia:

In the Hustings Court of the City of Richmond

And now at this day, to-wit: At a like Hustings Court, held in the Courthouse in the City Hall of said City on the 11th day of July, 1944, being the same day and year first hereinbefore written, the following order was entered, to-wit:

City of Richmond

v.

Dorothy Nippert, Dft.

[fol. 14] The transcript of the testimony and ordinances in the above cause, having been received by the Court on the 11th day of July, 1944, was this day signed and sealed by the Court and delivered to the Clerk of this Court, and is hereby made a part of the record in this cause.

A copy teste:

L. A. Schumann, Deputy Clerk.

In the Hustings Court of the City of Richmond

City of Richmond

vs.

Dorothy Nippert, Dft.

ORDINANCES AND FACTS ADDUCED AT TRIAL

Chapter 10, Section 4.—There shall be levied and collected for the calendar year 1931 and each calendar year thereafter, the following license taxes, to-wit: (December 24, 1930.)

Chapter 10. Section 23.—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors ..... $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of

Public Safety required before license will be issued. (December 15, 1933.)

Chapter 10, Section 166½.—Permits of Director of Public Safety Required for Certain Licenses.—(a) Every person, firm and corporation desiring a license under sections 14, 16, 23, 94, 120 and 143, of this chapter shall first apply to the Director of Public Safety for a permit on behalf of said individual, firm or corporation, as the case may be, to conduct the business which is desired to be conducted and shall produce to that Director evidence of the good character of the individual, the members of the firm, or the chief officers of the corporation, as the case may be, and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the character of said individual, each of the members of the firm, or each of the chief officers of the corporation, as the case may be, and if he be satisfied that the individual, the mem-
[fol. 15] bers of the firm or the principal officers of the Corporation, as the case may be, be of good moral character and a person or persons fit to engage in the proposed business, he shall issue the permit. The form of the application for such permit and the form of the permit itself shall be prepared and furnished by the Director of Public Safety.

(b) Every person, firm and corporation desiring a license under sections 25, 26, 29, 30, 31, 32, 33, 34, 35, 37, 38, 40 or 42 shall apply to the Director of Public Safety for a permit to conduct the desired business and furnish evidence to that Director that the house, building, structure, or room in which the proposed business is to be conducted is a suitable place to conduct said business and has facilities for escape in case of fire and is sufficiently strong and safe and otherwise complies with the building code of the City of Richmond and it shall thereupon be the duty of the Director of Public Safety to make a reasonable investigation of the facts in connection with such application and to cause the building inspector of the City of Richmond to make an inspection and report as to the condition of the premises and the compliance thereof with the building code of the City of Richmond. If the Director of Public Safety be satisfied that the premises are strong and safe and otherwise comply with the building code he shall issue the desired permit. The form of application for such permit and the form

of the permit itself shall be prepared and furnished by the Director of Public Safety. (January 5, 1944).

A copy teste:

L. A. Schumann, Deputy Clerk.

The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

[fol. 16] The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not therefore procured a City revenue license from the City of Richmond.

JUDGE'S CERTIFICATE

I, John L. Ingram, Judge of the Hustings Court of the City of Richmond, Virginia, who presided over the trial of the case of City of Richmond *v.* Dorothy Nippert, on June 16, 1944, do certify that the testimony included in the foregoing transcript was before me for consideration in the trial of said case.

And I further certify that the Attorney for the City of Richmond was given reasonable notice, in writing, of the time and place at which this certificate was to be tendered.

Given under my hand this 11th day of July, 1944.

John L. Ingram, Judge of the Hustings Court of the City of Richmond, Virginia.

A copy teste:

L. A. Schumann, Deputy Clerk.

[fol. 17] I, L. A. Schumann, Deputy Clerk of the Hustings Court of the City of Richmond, Virginia, do hereby certify that the foregoing transcript, duly authenticated and certified by the Judge of said Court, was delivered to me on the 11th day of July, 1944.

Given under my hand this 11th day of July, 1944.

L. A. Schumann, Deputy Clerk, Hustings Court of the City of Richmond.

I, L. A. Schumann, Deputy Clerk of the Hustings Court of the City of Richmond, Virginia, do certify that the foregoing is a true and correct transcript of the record in the case of City of Richmond *v.* Dorothy Nippert; and I do further certify that counsel of record for the City of Richmond had due notice of the intention of counsel for the defendant to apply for the said transcript before the same was made out and tendered.

Given under my hand this 11th day of July, 1944.

L. A. Schumann, Deputy Clerk, Hustings Court of the City of Richmond.

A Copy—Teste:

M. B. Watts, C. C.

[fol. 18] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: Campbell, C. J., Holt, Hudgins, Browning, Eggleston and Spratley, JJ.

Record No. 2901

DOROTHY NIPPERT

v.

CITY OF RICHMOND

From the Hustings Court of the City of Richmond, John H. Ingram, Judge

OPINION BY CHIEF JUSTICE PRESTON W. CAMPBELL—March 5, 1945

The litigants agree that in the case at bar the principal question is whether the ordinance of the city of Richmond, under which the defendant, Dorothy Nippert, was convicted, is violative of the Federal Constitution. That ordinance reads:

"*Chapter 10, Section 23.*—Agents—Solicitors—Persons, Firms or Corporations engaged in business as solicitors * * * $50.00 and one-half of one per centum of the gross earnings, receipts, fees or commissions for the preceding license year in excess of $1,000.00. Permit of Director of Public Safety required before license will be issued. (December 15, 1933)"

The defendant was arraigned in the Hustings Court of the city of Richmond upon a warrant emanating from the police justice's court, which charged "that on the 20th day of January, 1944, at said city of Richmond Dorothy [fol. 19] Nippert did unlawfully engage in Richmond in a business of a solicitor without having procured a city license assessable under section 23 of chapter 10 of the Richmond City Code of 1937."

Defendant, upon her arraignment, pleaded not guilty, and with her consent and the concurrence of the city attorney, the court proceeded to hear and determine the case without a jury. At the conclusion of the evidence, the court found the defendant guilty as charged in the warrant and assessed her fine at five dollars.

The facts certified by the trial judge are as follows:

"The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from city to city throughout the country and obtain orders for this particular garment, which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance [fol. 20] to the purchaser. The solicitors at no time make a delivery of the article.

"The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

"The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the places of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not *therefore* procured a City revenue license from the City of Richmond."

[fol. 21] The dominant assignment of error is:

"The Court erred in refusing to hold that the ordinance, in so far as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution."

Article 1, section 8, clause 3, of the United States Constitution reads:

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes."

Counsel for defendant rely upon *Robbins* v. *Shelby County*, 120 U. S. 489, 7 S. Ct. 592, to sustain the contention that the ordinance is violative of the commerce clause, *supra*. That case involved a tax upon a "drummer" or "traveling salesman" which is clearly distinguishable from the case at bar wherein the *gravamen* of defendant's offense was her "doing business" in the city of Richmond without first having procured the required license. It is not controverted that the defendant worked four days selling merchandise to the clerks of two large retail stores in the city of Richmond.

That the distinction between "mere solicitation" and "doing business" is more ethereal than real is, we think, [fol. 22] exemplified in the expression of Mr. Justice Rutledge in his dissent in *McLeod* v. *Dilworth Co.*, 64 Sup. Ct. 1030, 1033: "The old motion that 'mere solicitation' is not 'doing business' when it is regular, continuous, and persistent, is fast losing its force."

It is beyond dispute that both the initial and the ultimate burden of the tax imposed in the case at bar is the same and rests upon the defendant—the solicitor—who is an independent agent within the taxing jurisdiction, and upon her independent acts of soliciting which transpired in the city, and does not in the least rest upon the garment company which is outside of the State.

Since the decision of the Supreme Court in *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33, 60 Sup. Ct. 388, the former views as to the freedom of interstate commerce from local taxation have been greatly modified.

Following the doctrine announced in that case, this court, in *Dunston* v. *City of Norfolk*, 177 Va. 689, 15 S. E. (2d) 86, held that the States have a right to require interstate commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such [fol. 23] right may, in some measure, affect the commerce or increase the cost of business.

Mr. Justice Spratley, in his analysis of the Berwind-White decision, clearly draws the distinction between that case and *Robbins* v. *Shelby County, supra*. In this opinion this is said:

"The defendant relies on the often cited case of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, decided in 1887, and the decisions in line with it. There it was held that the State taxation upon interstate commerce or upon the privilege of engaging in it was a burden, and consequently violative of the purpose of the commerce clause. A vigorous dissent by Mr. Chief Justice Waite, joined in by Mr. Justice Field and Mr. Justice Gray, asserted the principle that the validity of a state tax depended upon the question whether it was discriminatory against citizens of one State in favor of those of another.

"In recent years, there has been a gradual relaxation and modification of the strict and narrow interpretation applied in the above case as to the purpose of the commerce clause. The decisions in many of the later cases are predicated upon the presence or absence of discrimination.

"Finally, the Supreme Court of the United States has declined to deny to the States the right to levy a tax upon [fol. 24] interstate commerce merely because it is such commerce. The latest cases recognize and admit the right of the States to require such commerce to bear its fair share of the cost of local government, notwithstanding the fact that the exercise of such right may, in some measure, affect the commerce or increase the cost of doing business. They declare that the purpose of the commerce clause is to allow interstate commerce to compete on a fair and equal basis with local commerce.

"Under the principles at present applied, the test of the validity of a State taxing law is whether it may, in its practical operation, be made an instrument for impeding or destroying interstate commerce or placing it at a disadvantage in competition with intrastate business."

In our opinion, the decision of the case at bar must rest upon the decision in the *Dunston case, supra*, and therefore, the judgment of the trial court is affirmed.

Affirmed.

[fol. 25] IN SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 2901

DOROTHY NIPPERT, Plaintiff in error,

against

CITY OF RICHMOND, Defendant in error

JUDGMENT—March 5, 1945

Upon a writ of error to a judgment rendered by the Hustings Court of the city of Richmond on the 16th day of June, 1944.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be, and is hereby, affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages and also its costs by it expended about its defense herein.

Which is ordered to be certified to the said Hustings court.

[fol. 26] Clerk's Certificate to transcript omitted in printing.

[fol. 27] IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 2901

DOROTHY NIPPERT, Petitioner,

vs.

CITY OF RICHMOND, Respondent

PETITION FOR APPEAL—Presented to the Chief Justice of the U. S. April 27, 1945

To Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia:

Your petitioner, Dorothy Nippert, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

Your petitioner was arrested on the 20th day of January, 1944 in the city of Richmond and charged with unlawfully engaging in the business of a solicitor in the City of Richmond without having procured a city license assessable under Section 23 of Chapter 10 of the Richmond City Code of 1937, and your petitioner was brought into the Police Court of the City of Richmond on the 22nd day of January, 1944 and was fined $25.00 and costs and ordered to purchase a city license as provided by Section 23, Chapter 10 of the Richmond City Code of 1937.

In the hearing before the police court justice evidence was presented to the trial justice that Dorothy Nippert was in charge of a sales force soliciting orders for a ladies' garment manufactured by the American Garment Com-[fol. 28] pany which was owned and operated by John V. Rosser in Washington, D. C. and that orders were solicited for this garment and a certain down payment was taken from the purchaser, which in most instances covered the commission of the solicitor, and the order was forwarded to Washington where it was filled and forwarded C. O. D. through the U. S. mails to the purchaser, and it was contended in the Police Court that the ordinance insofar as it referred to the petitioner in requiring that she obtain a permit was in conflict with the Commerce Clause of the Federal Constitution.

An appeal was noted from the judgment of the Police Court to the Hustings Court of the City of Richmond where a trial denovo was had and the same question was presented to the Hustings Court, that is, that the ordinance insofar as it referred to petitioner was in conflict with the Commerce Clause of the Federal Constitution and the following statement was an agreed statement of the facts as presented to the Hustings Court:

> "The American Garment Company, which is owned and operated by John V. Rosser, with its main office at 3617 12th Street, N. E., Washington, D. C., is engaged in the manufacture and sale of certain ladies' garments. The American Garment Company employs solicitors who travel from City to City throughout the country and obtain orders for this particular garment,

which is sold for $2.98, and the solicitor receives from the purchaser a down payment usually sufficient to pay the commission of the solicitor, and the order is then sent to the home office of the American Garment Company and the garment is then sent through the United States mails C. O. D. for the balance to the purchaser. The solicitors at no time make a delivery of the article.

The defendant herein was not and is not carried on the rolls of the American Garment Company as an employee and her sole compensation is the commission received from the sale of each article.

The defendant, Dorothy Nippert, on January 20, 1944, was soliciting orders for the American Garment Company, as above set forth, in the City of Richmond, [fol. 29] and that Dorothy Nippert had been engaged for four days prior to January 20, 1944, in going from place to place in the City of Richmond and in soliciting orders for the sale of merchandise on behalf of the American Garment Company and had, during that time, been engaged in going from place to place within the place of business of Miller & Rhoads, Incorporated, a large department store in the City of Richmond and within the place of business of one of the Five and Ten Cent Stores in the City of Richmond, and therein soliciting the Clerks in those stores so as to procure from those Clerks orders for the sale of merchandise on behalf of the American Garment Company, and that such solicitation occurred on the 20th of January, 1944, and that she, the said Dorothy Nippert, had not therefore procured a City revenue license from the City of Richmond."

The Hustings Court found your petitioner guilty of unlawfully engaging in Richmond in the business of a solicitor without having procured a city license assessable under Section 23 of Chapter 10 of the Richmond City Code and fined your petitioner $5.00 and costs.

A petition for a Writ of Error to the Hustings Court of the City of Richmond was filed in the Supreme Court of Appeals of Virginia in which there was assigned the following errors:

"1. The Court erred in holding that the City had the authority to pass the ordinance in question.

2. The Court erred in refusing to hold that the ordinance insofar as it referred to petitioner, was in conflict with the commerce clause of the Federal Constitution.

3. The Court erred in holding that petitioner had violated the law in soliciting orders in interstate commerce without having procured a city license as a solicitor."

The Supreme Court of Appeals of Virginia allowed a Writ of Error and the dominant assignment of error as set forth in the opinion of the Supreme Court of Appeals of Virginia was that the Court erred in refusing to hold that the ordinance insofar as it referred to petitioner was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution which reads:

[fol. 30] "The Congress shall have power • • • to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

That the Supreme Court of Appeals of the state of Virginia is the highest Court of said State in which a decision in this suit can be had.

That in said cause there is drawn in question the validity of the municipal ordinance of the City of Richmond on the ground that the said municipal ordinance is repugnant to the Constitution and laws of the United States and the decision is in favor of its validity, notwithstanding, your petitioner contends that said municipal ordinance violates the Commerce Clause of the Federal Constitution being Article 1, Section 8, Clause 3 of the United States Constitution.

That, therefore, in accordance with sec. 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules

of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

[fol. 31] Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of Appeals of Virginia, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of Appeals of the State of Virginia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of the State of Virginia, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Petitioner.

April 23, 1945.

Appeal refused.

Preston W. Campbell, Chief Justice.

[fol. 32] IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Dorothy Nippert, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of Virginia, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the final judgment dated the 5th day of March, 1945, of the Supreme Court of Appeals of Virginia, as prayed in said petition, and that the Clerk of the Supreme Court of Appeals of Virginia shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the [fol. 33] Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond for costs in the sum of Two Hundred Dollars, that said appellant shall prosecute said appeal to effect and answer all costs if he fails to make his plea good.

Harlan F. Stone, Chief Justice of the United States.

May First, 1945.

[fol. 34] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ASSIGNMENT OF ERRORS

The petitioner assigns the following errors in the record and proceedings in this cause:

1. The Court erred in refusing to hold that the ordinance of the City of Richmond, insofar as it referred to petitioner, was in conflict with Article 1, Section 8, Clause 3 of the United States Constitution, as it was contended by the petitioner in each Court.

2. The Court erred in holding that petitioner had violated the ordinance of the City of Richmond in soliciting orders in Interstate Commerce without having procured a city license as a solicitor and a permit from the Director of Public Safety.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the Supreme Court of Appeals of Virginia, dated the 5th day

of March, 1945, in the above entitled cause, be reversed and judgment entered in favor of this appellant.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Appellant.

April 23, 1945.

[fol. 35] In the Supreme Court of Appeals of Virginia

[Title omitted]

Acknowledgment of Service

I, the undersigned, of counsel for the City of Richmond, hereby acknowledge to have received a copy of the petition for appeal, the order allowing the appeal, the assignment of errors and statement as to jurisdiction.

Reference is also directed to Rule 12, Sub-Section 3 of the Rules of the Supreme Court of the United States, authorizing the appellee, within fifteen days after service of the foregoing papers, to file a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States which has been asserted by the appellant.

Henry R. Miller, Jr., Asst. City Atty., Attorney for City of Richmond.

May 4, 1945.

[fol. 36] Citation in usual form showing service on Henry R. Miller, Jr., omitted in printing.

[fols. 37-38] Bond on appeal for $200.00 approved, omitted in printing.

[fol. 39] In the Supreme Court of Appeals of Virginia

[Title omitted]

Stipulation for Transcript of Record

It is hereby stipulated and agreed by the parties hereto, through their respective counsel of record, that the Clerk

shall prepare, and it will constitute the entire record necessary on this appeal, the following:

1. Commencing on Page 10 of the record, titled "Record", through Page 17, as it is set forth in the printed record No. 2901.
2. Memo: "Writ of Error granted".
3. Petition for appeal.
4. Order allowing appeal.
5. Assignment of errors.
6. Acknowledgment of service.
7. Copy of opinion of this Court.
8. This Stipulation.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Appellant; Henry R. Miller, Jr., Asst. City Atty., Attorney for City of Richmond.

[fol. 40] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed May 19, 1945

Comes now the appellant and adopts her Assignment of Errors as her statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Cornelius H. Doherty, Stanley H. Kamerow, Attorneys for Appellant.

A copy of the foregoing statement and designation acknowledged this 17th day of May, 1945.

Henry R. Miller, Jr., Attorney for Appellee.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 11, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 49717. Virginia Supreme Court of Appeals. Term No. 72. Dorothy Nippert, Appellant, vs. City of Richmond. Filed May 14, 1945. Term No. 72 O. T. 1945.

(9467)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 72

DOROTHY NIPPERT,

Petitioner,

vs.

CITY OF RICHMOND

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

CORNELIUS H. DOHERTY,
STANLEY H. KAMEROW,
Counsel for Appellant.